No. 92-1915

FILED
JUN 1 1993
OFFICE OF THE CLERK

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1992

YOUELL & COMPANIES AND
INSURANCE COMPANY OF NORTH AMERICA

Petitioners,

VS.

GETTY OIL COMPANY AND
TEXACO INC.,

Respondents.

On Writ of Certiorari to the Texas Supreme Court

APPENDICES TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX A

IN THE SUPREME COURT OF TEXAS

No. D-1937

GETTY OIL COMPANY AND
TEXACO INC., PETITIONERS

V.

INSURANCE COMPANY OF NORTH AMERICA,
NL INDUSTRIES, INC. AND YOUELL
AND COMPANIES, RESPONDENTS

ON APPLICATION FOR WRIT OF ERROR
TO THE COURT OF APPEALS
FOR THE FOURTEENTH DISTRICT OF TEXAS

OPINION

The purchaser of certain chemicals brought suit against the seller and its insurers, claiming that they were

contractually obligated to provide insurance to cover a judgment against the purchaser in a wrongful death action precipitated by the explosion of the chemicals. The trial court granted summary judgment for the defendants on four grounds: (1) a contract provision requiring the seller to purchase liability insurance for the buyer violated the Texas Oilfield Anti-Indemnity Statute, TEX. REV. CIV. STAT. ANN. art. 2212b (now codified and amended at TEX. CIV. PRAC. & REM. CODE §§ 127.001-.007 (Vernon 1986 & Supp. 1992)); (2) the same contractual provision violated the common law express negligence rule; (3) the prior litigation of a related indemnity provision precluded the present suit under the doctrine of res judicata; and (4) specific issues were precluded by collateral estoppel. The court of appeals affirmed on the theory of res judicata. 819 S.W.2d 908. We affirm the judgment of the court of appeals in part, reverse in part, and remand the cause to the trial court for further proceedings.

I. *Facts and Procedural Background*

Getty Oil Company ("Getty") purchased various chemicals from NL Industries, Inc. ("NL") for Getty's oil production and exploration operations in the Midland, Texas, area. A purchase order numbered "HB-5357" was in effect from August 1, 1983, to July 31, 1984. It included the following provisions:

> 4. INSURANCE AND INDEMNITY: Seller agrees to maintain at Seller's sole cost and expense, from the time operations are commenced hereunder until Order is fully

performed and discharged, insurance of all types and with minimum limits as follows, and furnish certificates to Purchaser's Purchasing Department evidencing such insurance with insurers acceptable to Purchaser:

WORKMEN'S COMPENSATION	STATUTORY
EMPLOYERS' LIABILITY	$500,000
GENERAL LIABILITY:	
BODILY INJURY	500,000

. . .

AUTOMOBILE LIABILITY:	
BODILY INJURY	500,000

. . .

All insurance coverages carried by Seller, whether or not required hereby, shall extend to and protect Purchaser. . . to the full amount of such coverages and shall be sufficiently endorsed to waive any and all claims by the underwriters or insurers against Purchaser. . .

Seller shall indemnify, defend and hold harmless Purchaser. . . from any and all losses, claims, actions, costs, expenses, judgments, subrogations, or other damages resulting from injury to any person (including injury resulting in death), or damage (including loss or destruction to property of whatsoever nature

> of any person) arising out of or incident to the performance of the terms of this Order by Seller (including, but not limited to, Seller's employees, agents, subcontractors, and others designated by Seller to perform work or services in, about, or attendant to, the work and services under the terms of this Order.) Seller shall not be held responsible for any losses, expenses, claims, subrogations, actions, costs, judgments, or other damages, directly, solely, and proximately caused by the negligence of Purchaser. Insurance covering this indemnity agreement shall be provided by Seller.
>
> The liability of Seller, as herein above provided, shall not be limited by the insurance coverage required of Seller.

On November 22, 1983, a barrel of chemical demulsifier delivered by NL under Order No. HB-5357 exploded in the vicinity of a Getty well, killing Carl Duncan, an independent contractor working for Getty.

Duncan's estate and survivors brought wrongful death and survival actions in the 130th Judicial Court of Matagorda County against Getty, NL and its subsidiaries, and others.[1] Getty filed a cross-claim against NL, alleging

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[1] In 1984, Texaco, Inc. acquired Getty. Accordingly, Texaco was joined as a party defendant. The plaintiffs also acted against Rimes Well

(continued...)

that NL's negligence proximately caused the injury to Duncan, that the chemicals manufactured by NL were defective, and that NL breached warranties in connection with the sale of the chemicals. Getty also asserted a contractual right of indemnity against NL under the terms of HB-5357 (quoted above), and a contribution claim because of NL's negligence. The jury found Getty 100% negligent and grossly negligent in causing the accident. The trial court rendered judgment on the jury verdict for $3,757,000 actual damages and $25,000,000 punitive damages. The trial court also rendered judgment that "all Cross-Actions for contributions and/or indemnity based upon the contracts are denied." Getty appealed the portion of the judgment denying it contribution and indemnity, and the court of appeals affirmed the judgment of the trial court. *Getty Oil Corp. v. Duncan*, 721 S.W. 2d 475 (Tex. App.—Corpus Christi 1986, writ ref'd n.r.e.). Getty's insurers, Travellers Insurance Company, Travellers Indemnity Company, and English & American Insurance Company, settled the claim for $14 million.

Getty then filed an insurance claim with NL's insurers. After they refused to honor the claim, Getty sued NL and its primary and excess insurance carriers, Insurance Company of North America ("INA") and Youell and Companies[2] ("Youell"), respectively.[3] Getty alleged that,

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[1](...continued)
Service, a company that had been doing work at the accident site, and Tony Roa, one of its employees.

[2] Youell & Cos. is a consortium of offshore insurance companies and Lloyds syndicates.

pursuant to the terms of the HB-5357 "Insurance and Indemnity" provision, NL's insurance should cover Getty for its liability in the *Duncan* case. Getty brought claims against NL for breach of the contract to purchase insurance in its behalf, violation of TEX. BUS. & COM. CODE § 1.203 (Tex. UCC) (Vernon 1968) (obligation of good faith), breach of the duty of good faith and fair dealing, negligence, violation of the Texas Deceptive Trade Practices Act ("DTPA"), TEX. BUS. & COM. CODE §§ 17.41-63 (Vernon 1987 & Supp. 1992), and common law fraud. Against INA and Youell, Getty asserted claims for breach of the contract to extend its insurance coverage, violation of TEX. INS. CODE art. 3.62 (Vernon 1981) (repealed) (failure to pay claim), breach of the duty of good faith and fair dealing, negligence, violation of the DTPA, and common law fraud.

NL, INA and Youell jointly moved for summary judgment, arguing that (1) the terms of HB-5357 did not make Getty an additional insured under NL's policies; (2) the Insurance and Indemnity scheme of HB-5357 was prohibited by the Texas Oilfield Anti-Indemnity Statute, TEX. REV. CIV. STAT. ANN. art. 2212b (now codified and amended at TEX. CIV. PRAC. & REM. CODE §§ 127.001-007); and

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[3](...continued)

[3] Getty originally filed suit in the 10th District Court in Galveston County. The defendants removed to the United States District Court for the Southern District of Texas. The federal court held that Getty's claims were barred by res judicata, but the United States Court of Appeals for the Fifth Circuit vacated the judgment, holding that complete diversity of citizenship was lacking. *Getty Oil Corp., a Div. of Texaco v. Ins. Co. of North America*, 841 F.2d 1254 (5th Cir. 1988). The case was remanded to state court in Galveston County, and then transferred by agreement to Harris County, where it was assigned to the 280th District Court.

3) Getty's claims were barred by res judicata and collateral estoppel. The defendants also joined Getty's insurers as third party defendants, claiming that Getty's policies with them at least partially relieved the defendants of covering Getty's liability.

On May 3, 1990, the trial court granted the defendants' motions for summary judgment. The trial court also granted the defendants' motion to sever the third party claims against Getty's insurers, and ordered that the severed actions not go forward until resolution of the action between Getty and the defendants. Getty appealed the summary judgment for defendants, and the court of appeals affirmed on res judicata grounds, holding that Getty's claims were barred because it was seeking the same relief under a different theory that it unsuccessfully sought in the first suit. 819 S.W.2d at 915. Getty now seeks a reversal of the court of appeals' judgment and the trial court's summary judgment.[4]

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[4] Three amici curiae have submitted briefs in support of Getty's position: Texas Mid-Continent Oil and Gas Association, Shell Oil Company, and Amerada Hess Corporation. Three amici curiae have also submitted briefs in support of the Respondents' position: the International Association of Drilling Contractors (IADC); the Associated General Contractors of Texas (AGC), and the Association of Oilwell Servicing Contractors (AOSC).

II. *Res Judicata*

A. *Getty v. NL*

We recently clarified that Texas follows the "transactional" approach to res judicata. *See Barr v. Resolution Trust Corp.*, _____ S.W.2d _____ (Tex. 1992). Under this approach, a judgment in an earlier suit "precludes a second action by the parties and their privies not only on matters actually litigated, but also on causes of action or defenses which arise out of the same subject matter and which might have been litigated in the first suit." *Id.* at _____; *Texas Water Rights Comm. v. Crow Iron Works*, 582 S.W.2d 768, 771-72 (Tex. 1979).

We conclude that Getty's present suit arises out of the same subject matter as its earlier cross-claim against NL asserted in the *Duncan* suit. The RESTATEMENT (SECOND) OF JUDGMENTS, which recognizes the transactional test, suggests that factors to consider in determining whether facts constitute a single "transaction" are "their relatedness in time, space, origin, or motivation, and whether, taken together, they form a convenient unit for trial purposes." RESTATEMENT (SECOND) OF JUDGMENTS § 24 cmt. b (1980). Getty's present action against NL arose from the same accident that was adjudicated in the *Duncan* suit. The present suit also concerns the same contract, HB-5357, and the same section of that contract, the "Insurance and Indemnity" section. Finally, Getty seeks the same relief against NL here as in its earlier cross-claim: reimbursement for Getty's liability to Duncan's estate and beneficiaries. Thus,

both Getty's actions against NL derived from the same transaction.[5]

Getty argues that res judicata cannot bar its present claims against NL because these claims did not accrue until judgment was rendered in the *Duncan* suit. That is, Getty had no liability and hence no need for insurance coverage until liability was assigned. The contingent nature of these claims, however, does not preclude the operation of res judicata. We held in *Barr* that "[a] subsequent suit will be barred if it arises out of the same subject matter of a pervious suit and which, through the exercise of diligence,

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[5] This conclusion comports with a recent Fifth Circuit decision involving nearly identical facts. *Ocean Drilling and Exploration Co. v. Mont Boat Rental Service*, 799 F.2d 213 (5th Cir. 1986). In that case, Mont had contractually agreed to indemnify ODECO and to purchase liability insurance that would name ODECO as an additional insured. In 1978, an ODECO employee was injured and sued both ODECO and Mont. ODECO brought a cross-claim against Mont, asserting contribution and indemnity. The trial court rendered judgment of $340,000 solely against ODECO, found Mont not liable, and rendered judgment against ODECO on its claims against Mont. ODECO then brought a second suit against Mont under the additional insured provision. The trial court held that the action was barred by res judicata. The Fifth Circuit affirmed, holding as follows:

> Although the tort-indemnity theory that ODECO asserted in [the former case] differs from the contractual liability theory it now presses, the right ODECO seeks to redress is the same reimbursement for obligations it incurred as a result of the [prior] litigation. . . . Because ODECO's cause of action for tort indemnity is based on substantially the same facts as its claim for contractual indemnity, res judicata bars the belated assertion.

799 F.2d at 217.

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could have been litigated in a prior suit." _____ S.W.2d at _____. Getty could have asserted its present claims in the *Duncan* suit, with their resolution being contingent on the plaintiffs' claims. Texas Rule of Civil Procedure 51(b) provides:

> Joinder of Remedies. Whenever a claim is one heretofore cognizable only after another claim has been prosecuted to a conclusion, the two claims may be joined in a single action; but the court shall grant relief in that action only in accordance with the relative substantive rights of the parties.

See Parkhill Produce Co. v. Pecos Valley Southern Ry. Co., 348 S.W.2d 208 (Tex. Civ. App.—San Antonio 1961, writ ref'd n.r.e.). For example, we have held that an indemnitee may bring a claim against an indemnitor before judgment is assigned against the indemnitee. *See Gulf, Colorado & Santa Fe Ry. Co. v. McBride*, 159 Tex. 442, 446, 322 S.W.2d 492, 495 (Tex. 1958); *Mitchell's, Inc. v. Friedman*, 157 Tex. 424, 431, 303 S.W.2d 775, 779 (Tex. 1957); *K&S Oil Well Service, Inc. v. Cabot Corp.*, 491 S.W.2d 733, 739 (Tex. Civ. App.—Corpus Christi 1973, writ ref'd n.r.e.). Forcing the indemnity suit to wait for judgment in the liability suit "would contravene the policy of the courts to encourage settlements and to minimize litigation." *Id.*

Getty itself took advantage of this rule in its initial cross-action against NL, in which Getty asserted its claim under the indemnity provision of HB-5357. The fact that Getty had no claim for indemnity against NL until the trial

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court rendered judgment did not preclude this cross-claim. Likewise, Getty could have brought its other contingent cross-claims against NL in the *Duncan* action. The fact that Getty's claims against NL were contingent on Getty incurring liability in the *Duncan* suit does not in and of itself preclude operation of res judicata.[6]

We do not hold that a defendant must assert a cross-claim against a co-defendant simply because it arises from the same subject matter as plaintiff's claim. TEX. R. CIV. P. 97(e) clearly makes such a cross-claim permissive: the defendant may assert it, but is not required to. Rule 97(e) comports with the principle that res judicata applies only to *adverse* parties. Where two parties are aligned in the first action and no issues are drawn between them, the judgment in that action does not preclude later claims between those parties. *See Smith v. Baker*, 380 S.W.2d 725, 726 (Tex. Civ. App.—Waco 1964, writ ref'd n.r.e.); *Green v. City of San Antonio*, 282 S.W.2d 769, 776 (Tex. Civ. App.—San Antonio

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[6] If Getty believed that trying all of these claims in the same action would have been prejudicial, it could have moved the trial court to bifurcate the trial under TEX. R. CIV. P. 174(b), which provides: "in furtherance of convenience or to avoid prejudice [the court] may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues."

Also, if for any reason Getty could not have obtained a just adjudication of its claim against NL under the additional insured provision without the presence of NL's insurers, which, as discussed in the next section could not have been joined in the *Duncan* suit, then the trial court could have severed this claim and stayed it until after judgment was rendered on the primary claims.

1955, writ ref'd n.r.e.; *Second Nat'l Bank of Houston v. Fuqua*, 262 S.W.2d 834, 835 (Tex. Civ. App.—Waco 1953, writ ref'd n.r.e.). However, where a defendant *does* assert a cross-claim against a co-party, they become adverse, and the principles of res judicata apply. The cross-claimant becomes a plaintiff for res judicata purposes, and is required to assert all claims against the cross-defendant arising from the subject matter of the original cross-claim. *Cf.* RESTATEMENT (SECOND) JUDGMENTS § 23 (1980) ("Where a defendant interposes a claim as a counterclaim and a valid and final judgment is rendered against him on the counterclaim, the rules of bar are applicable to the judgment.").

Getty relies on *Chandler v. Cashaway Building Materials, Inc.*, 584 S.W.2d 950, 954 (Tex. App.—El Paso 1979, no writ), where the court held that res judicata "applies to the cause of action which was actually filed by the plaintiff and not cross-actions which might have been filed by a defendant, unless, of course, the compulsory counterclaim rule is applicable." *See also Swiss Avenue Bank v. Silvka*, 724 S.W.2d 394, 396-97 (Tex. App.—Dallas 1986, no writ). These cases merely reiterate the principle of Rule 97(e) that a party is not required to assert a cross-claims against an otherwise non-adverse party. Neither *Chandler* nor *Silvka* involved a situation where a party asserted some, but not all of its cross-claims.

Getty was not required to bring any of its cross-claims against NL in the *Duncan* suit. Once it chose to bring some of those claims, however, it was required under res judicata to bring them all in the same action.

Accordingly, we agree with the court of appeals' holding as to this issue.

B. *Getty v. INA and Youell*

The court of appeals also held that Getty's claims against INA and Youell, NL's primary and excess insurance carriers, were barred by res judicata. Although INA and Youell were not parties to the *Duncan* suit, the court reasoned that res judicata bars a second suit "against the same parties *or their privies*." 819 S.W.2d at 910 (emphasis added).

Under Texas law, a former judgment bars a second suit against all who were in "privity" with the parties to the first suit. *Benson v. Wanda Petroleum Co.*, 468 S.W.2d 361, 363 (Tex. 1971). There is no general definition of privity than can be automatically applied in all res judicata cases; the circumstances of each case must be examined. *See Dairyland County Mutual Ins. Co. of Texas v. Childress*, 650 S.W.2d 770, 773-74 (Tex. 1983); *Benson*, 468 S.W.2d at 363. Those in privity with a party may include persons who exert control over the action, persons whose interests are represented by the party, or successors in interest to the party. *See Dairyland*, 650 S.W.2d at 774.

Getty replies that even if INA and Youell were in privity with NL, res judicata would not bar Getty's present claims against them because Getty could not have asserted those claims in the *Duncan* suit. The insurance policies themselves specifically prohibited any claim from being brought against INA or Youell before the insured's liability

was reduced to judgment or compromised.[7] We have held that when such "no action" policy provisions exist, "a third party's right of action against the insurer does not arise until he has secured such an agreement or a judgment against the insured." *Great American Ins. Co. v. Murray*, 437 S.W.2d 264, 265-66 (Tex. 1969); *see also State Farm County Mut. Ins. Co. of Texas v. Ollis*, 768 S.W.2d 722, 723 (Tex. 1989).

Moreover, TEX. R. CIV. P. 38(c) prohibited Getty from joining INA and Youell in the *Duncan* suit. This rule provides, with respect to the joinder of third parties:

> (c) This rule shall not be applied, in tort cases, so as to permit the joinder of a liability

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[7] The INA General Insurance Policy contained the following condition:

> 5. Action Against Company
> No action shall lie against the Company unless. . . the amount of the insured's obligation to pay shall have been finally determined either by judgment against the insured after actual trial or by written agreement of the insured, the claimant and the Company.

The Youell policy contained the following condition:

> J. LOSS PAYABLE
> . . .
> The Assured shall make a definite claim for any loss for which the Underwriters may be liable under this policy within twelve (12) months after. . . the Assured's liability shall have been fixed and rendered certain either by final judgment against the Assured after actual trial or by written agreement of the Assured, the claimant, and Underwriters.

> or indemnity insurance company, unless such company is by statute or contract liable to the person injured or damaged.

Rule 38(c) has been held to prohibit the joinder of insurers in situations resembling this case. *See Langdeau v. Pittman*, 337 S.W.2d 343, 355 (Tex. Civ. App.—Austin 1960, writ ref'd n.r.e.).

Since Getty could not have asserted its present claims against INA or Youell in the *Duncan* suit,[8] it is not now precluded by res judicata from bringing these claims. We accordingly reverse the judgment of the court of appeals affirming the trial court's summary judgment against INA and Youell on the ground of res judicata, and we remand

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[8] This result comports with the RESTATEMENT (SECOND) OF JUDGMENTS § 51 (1980):

> If two persons have a relationship such that one of them is vicariously responsible for the conduct of the other [NL and its insurers], and an action is brought by the injured person against one of them [Getty's cross-claim], the judgment in the action has the following preclusive effects against the injured person in a subsequent action against the other.
>
> (1) A judgment against the injured person [Getty] that bars him from reasserting his claim against the defendant in the first action [NL] extinguishes any claim he has against the other person [the insurers] responsible for the conduct unless:
>
> (a) The claim asserted in the second action is based upon grounds that could not have been asserted [payment under the policy] against the defendant in the first action. . . .

this portion of the cause to the trial court for further proceedings.

III. *Collateral Estoppel*

The trial court also granted summary judgment for respondents on the basis of collateral estoppel. The court of appeals did not reach this question.

The doctrine of collateral estoppel precludes relitigation of ultimate issues of fact actually litigated and essential to the judgment in a prior suit. *Tarter v. Metropolitan Savings & Loan Ass'n*, 744 S.W.2d 926, 927 (Tex. 1988) *Bonniwell v. Beech Aircraft Corp.*, 663 S.W.2d 816, 818 (Tex. 1984); RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1980). NL first argues that Getty seeks to relitigate the issue of whether Duncan's accident arose in connection with NL's performance of the purchase order. This issue is important because HB-5357 requires NL to provide insurance for Getty only for losses "arising out of or incident to the performance of the terms of this Order by

[NL]. . . ."[9] NL contends that the jury decided this issue adversely to Getty in the *Duncan* case.

Collateral estoppel requires that the issue decided in the first action be identical to the issue in the pending action. *See Price v. Texas Employers' Ins. Ass'n*, 782 S.W.2d 938, 940 (Tex. App.—Tyler 1989, writ ref'd n.r.e.). The jury in the *Duncan* suit found that NL was not negligent and that it placed adequate warnings on the chemicals, but neither the jury nor the trial court expressly found that the accident did not arise out of or incident to NL's performance of the purchase order. NL contends, however, that the phrase "incident to [NL's] performance" in HB-5357 refers only to losses caused by NL's negligence, and thus the jury's answers necessarily equate to a finding that Duncan's accident was not incident to the performance of HB-5357. The court in the *Duncan* case, however, apparently made no finding regarding this question. Also, we do not consider the language necessarily to be as narrow as NL contends.

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[9] This limitation expressly appears in the indemnity section of HB-5357, but not in the insurance section. Getty does not contend, however, that NL's obligation to provide insurance extends to risks beyond those associated with performance of the purchase order. Getty pled as follows in its Fourth Amended Petition:

> Pursuant to [HB-5357], NL was contractually obligated to obtain and maintain, at NL's cost, liability insurance to protect Getty from liability for personal injuries occurring in connection with the performance of the NL-Getty contract.

Getty likewise acknowledges in its reply brief to this Court that it must prove "the sale by NL under the contract of the product involved in the Duncan accident."

Getty's construction -- that an injury is "incident to performance" as long as it results from chemicals delivered by NL under the contract -- is also arguable under the literal language of the agreement. The parties have not focused on the proper interpretation of this language in their briefing and argument to this Court,[10] and thus we are unable under the present record to conclude that NL's obligation to provide insurance applied only for accidents caused by NL's negligence. Without such a finding, we cannot conclude that Getty is attempting to relitigate a factual issue decided by the jury in the *Duncan* case, and NL's collateral estoppel argument must therefore fail.

NL further argues that Getty is attempting to relitigate a legal issue previously decided in the *Duncan* suit: whether Getty has a right of indemnity from NL. Collateral estoppel also precludes the relitigation of essential issues of law that were litigated and determined in a prior action. *Price*, 782 S.W.2d at 940-41; *Withers v. Republic Nat'l Bank of Dallas*, 248 S.W.2d 271, 282 (Tex. Civ. App—Beaumont 1952, writ ref'd n.r.e.); RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1980). It was determined in the *Duncan*

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[10] NL does cite *Joe Adams & Sons v. McCann Construction Co.*, 475 S.W.2d (Tex. 1971), where the Court held that an indemnity agreement requiring a subcontractor to indemnify the general contractor for injuries sustained "through or on account of any act or in connection with the work of the [subcontractor]" did not apply to injuries caused solely by the general contractor's negligence, even though an act of the subcontractor was a contributing cause-in-fact. The holding, however, was based on the express negligence doctrine. As discussed in Section V, *supra*, this doctrine has been held to apply only to indemnity provisions, not to insurance-shifting provisions, and thus *McCann* is not helpful in interpreting the additional insured provision of HB-5357.

suit that Getty had no right of indemnity from NL, but Getty is not attempting to relitigate that issue here. Rather, it is seeking damages for NL's failure to extend insurance coverage to Getty. Although the latter action arose from the same transaction as the former and, with respect to Getty's claim against NL, is barred by res judicata, it is based on a different provision of HB-5357 and does not present the same legal issue. As indicated, collateral estoppel only applies where the *identical* issue was litigated in the prior suit. *Price*, 782 S.W.2d at 940.

For the foregoing reasons, the court of appeals' judgment cannot be affirmed on the basis of collateral estoppel.

IV. *Anti-Indemnity Statute*

The Texas Oilfield Anti-Indemnity Statute, TEX. REV. CIV. STAT. ANN. art. 2212b (now codified and amended at TEX. CIV. PRAC. REM. CODE §§ 127.001-007), provides that an agreement pertaining to an oil or gas well is void if it purports to indemnify a party from loss or liability for damage arising out of its own negligence.[11] Prior

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[11] Section 2 of Article 2212b provides:

> [A] covenant, promise, agreement, or understanding contained in, collateral to, or affecting an agreement pertaining to a well for oil, gas, or water, or mine for any mineral, is void and unenforceable if it purports to indemnify the indemnitee [Getty] against loss or liability for damages arising from either death or bodily injury to persons, or injury to property, or any other loss, damage, or expense arising from either death or bodily injury,

(continued...)

to the enactment of Article 2212b in 1973, many oil companies and oil well operators had "hold harmless" agreements with oil well drilling and service contractors. These agreements generally required the contractors to indemnify the operators for losses caused by the negligence of the contractor, and often for the negligence of the operator and third parties as well. Many believed that such agreements placed an undue financial burden on what were perceived to be small contractors with less bargaining power than the operators with whom they were negotiating contracts. *See* HOUSE INTERIM STUDY COMMITTEE ON HOLD HARMLESS AGREEMENTS, REPORT, 63rd Leg. at 3-8 (1973) [hereinafter HOUSE STUDY COMMITTEE]. In 1973, the legislature attempted to cure this perceived inequity by enacting Article 2212b, which prohibits agreements that indemnify a party for its own negligence.

The court of appeals held that under the statute, the "additional insured" provision of HB-5357 is facially invalid because it makes NL indemnify Getty for Getty's own negligence.[12] It reasoned:

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[11](...continued)

> injury to property, or loss, damage, or expense, which is caused by or results from the sole or concurrent negligence of the indemnitee [Getty], or an agent or employee of the indemnitee, or an independent contractor who is directly responsible to the indemnitee.

[12] This case does not present the question whether the indemnity provision of HB-5357 is void under the terms of the Anti-Indemnity Statute, and we express no opinion on this issue.

> [T]he effect of upholding [the provision] would be to allow Getty to avoid liability for its sole negligence. This result... contravene[s] the statutory goal of prohibiting agreements allowing a party to avoid responsibility for the results of its own negligence.

819 S.W.2d at 914.

Getty argues that the court of appeals erred because the provision at issue is an "additional insured" provision, and the Anti-Indemnity Statute only applies to indemnity provisions, which are different. Prohibited indemnity provisions make the indemnitor (NL) liable for the indemnitee's (Getty's) negligence. Additional insured provisions, on the other hand, make the insurance-purchaser's insurers (INA and Youell) liable for the loss caused by the insured's (Getty's) negligence. The insurance-purchaser is responsible only for paying the insurance premiums, presumably far less than the actual loss. Moreover, the cost of premiums is certain and exact. Thus, contractors are still protected by the Anti-Indemnity Statute from large and uncertain liabilities caused by an indemnitee's negligence.

Respondents argue that recognizing a distinction between the indemnity and insurance provisions would allow Getty to accomplish indirectly what it otherwise could not achieve directly avoiding liability for its own negligence. Section 5 of the Anti-Indemnity Statute specifically provides:

> Each party to an agreement defined in Section 3 of this Act shall be responsible for

> the results of his own actions and for the actions of those persons over whom he exercises control.

They contend that if the additional insured provision of this contract is not rendered unenforceable, Getty will be able to evade responsibility for its actions, in contravention of this statutory command.[13]

NL, in particular, argues that under § 4(c) of article 2212b, the burden of procuring insurance may be shifted only when the insurance supports an obligation to provide indemnity against claims for injury to the contractor's own employees. Because Duncan was an independent contractor working for Getty, and not an NL employee or contractor, this limited exception does not authorize the "insurance shifting" scheme of the contract.

We conclude that section 5 of article 2212b simply states the policy behind the prohibition of indemnity agreements, and does not have substantive effect. Section 5, if interpreted as broadly as respondents urge, would prohibit a party from obtaining its own liability insurance, clearly not the intent of the statute.

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[13] Amicus Curiae International Association of Drilling Contractors, aligned with Respondents, further argues that if a contractor is required to purchase insurance covering the negligence of an operator and third parties, it will be forced to bear significant costs in the form of dramatically increased insurance premiums or, if insurance becomes unavailable, the necessity to self-insure, and increased safety risks resulting from the operator's freedom to act negligently.

We further conclude that the language of article 2212b applies exclusively to indemnity agreements. Section 4(c) does not prohibit "insurance shifting" schemes that do not fall within its parameters; rather it *permits* certain indemnity agreements if they are supported by liability insurance and meet the section's other requirements. Art. 2212b, § 4(c) (now codified and amended at TEX. CIV. PRAC. & REM. CODE § 127.005). The Anti-Indemnity statute does not purport to regulate any agreements for the purchase of insurance unless they are in support of indemnity agreements.

Respondents argue that the additional insured provision of HB-5357 does support the indemnity agreement which follows it. They cite *Fireman's Fund Ins. Co. v. Commercial Standard Ins. Co.*, 490 S.W.2d 818, 823 (Tex. 1972), in which we reasoned that the liability insurance provision of a contract should be construed as assuring performance of an indemnity agreement also contained in the contract.

While we express no opinion as to whether Getty is an additional insured under NL's insurance policies, we agree with the court of appeals that the contract in the instant case is significantly different from that in *Fireman's Fund*. *See* 819 S.W.2d at 912. The indemnity provision in paragraphs 3-4 of HB-5357 is supported by an insurance provision separate from an additional to the additional insured provision in paragraphs 1-2. The last sentence of paragraph 3 provides that "[i]nsurance covering this indem-

nity agreement shall be provided by Seller."[14] This provision, not the first sentence of paragraph 2, which begins "All insurance coverage carried by Seller. . . shall extend to and protect Purchaser," supports the indemnity agreement. Moreover, the additional insured provision requires that NL extend insurance coverage to Getty "whether or not required [by the other provisions of the contract]." Thus, the additional insured provision of the contract does not support the indemnity agreement, but rather is a separate obligation. We disagree with the concurring and dissenting opinion that the contract is susceptible to any other reasonable interpretation. The additional insured provision, which does not support an indemnity agreement, is not prohibited by the language of the Anti-Indemnity Statute.

Respondents also argue that the three other states having oilfield anti-indemnity statutes have not permitted insurance-purchasing agreements like the one in this case.[15] *See Babineaux v. McBroom Rig Bldg. Svc., Inc.*, 806 F.2d 1282, 1284 (5th Cir. 1987) (applying Louisiana law);

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[14] As indicated, we express no opinion on the validity of the indemnity agreement of HB-5357, including this supporting insurance requirement.

[15] Only Texas, Louisiana, New Mexico and Wyoming have anti-indemnity statutes directed particularly at oil and gas operations. *See generally* Battiato & Gilbertson, THE CHANGING INSURANCE MARKET - WHO WILL BEAR THE RISK?, 32 ROCKY MTN. MIN. L. INST. § 17.04 at 17-16 (1986); Owen L. Anderson, THE ANATOMY OF AN OIL AND GAS DRILLING CONTRACT, 25 Tulsa L.J. 359, 421-431 (1990).

Other oil and gas producing states, such as Alaska, Arizona, California and South Dakota, have anti-indemnity statutes that target construction contracts. Battiato & Gilbertson, *supra*, at 15-16.

Nesom v. Chevron U.S.A., Inc., 633 F. Supp. 55, 59 (E.D. La. 1984); *Amoco Prod. Co. v. Action Well Serv., Inc.*, 755 P.2d 52, 55 (N.M. 1988); *Murray v. Trunkline Gas Co.*, 544 So. 2d 28, 32, (La. Ct. App. 1989). *Cf. Mountain Fuel Supply Co. v. Everson*, 578 P.2d 1351, 1354 (Wyo. 1978) (validity of insurance provision not reached, but court expressed doubt that such a provision would be valid).[16] Respondents urge that we follow these jurisdictions, particularly New Mexico, whose oilfield and anti-indemnity statute influenced the

---

[16] Getty cites no oilfield anti-indemnity statute cases to counter Respondents' position. Getty does, however, not that courts interpreting other types of anti-indemnity statutes have differentiated between indemnity and additional insured provisions. *See, e.g., Voisin v. O.D.E.C.O. Drilling Co.*, 744 F.2d 1174, 1177 (5th Cir. 1984), *cert. denied*, 470 U.S. 1053, 105 S. Ct. 1757, 84 L. Ed. 2d 820 (1985) (Longshoremen's and Harbor Workers' Compensation Act § 5(b), 33 U.S.C.A. § 905(b) (1976); *Kinney v. G.W. Lisk Co.*, 76 N.Y.2d 215, 557 N.Y.S.2d 283, 556 N.E.2d 1090 (1990) (N.Y. Gen. Oblig. Law § 5-322.1 (McKinney 1989) (construction anti-indemnity)); *Bosio v. Branigar Organization, Inc.*, 154 Ill. App. 3d 611, 107 Ill. Dec. 105, 506 N.E.2d 996 (Ill. App. Ct. 1987) (Ill. Rev. Stat. ch. 29, pars. 61 (1985) (construction)); *Cone Bros. Contracting Co. v. Ashland-Warren, Inc.*, 458 So. 2d 851, 855-56 (Fla. Dist. Ct. App. 1984) (Fla. Stat. ch. 725.06 (1977) (construction anti-indemnity)).

We do not believe that the maritime and construction anti-indemnity statutes discussed in these cases are helpful in interpreting our oilfield and anti-indemnity statute. The policies behind these foreign statutes do not reflect the concerns of the oil industry in Texas. For example, the Illinois construction anti-indemnity statue, Ill. Rev. Stat. ch. 29, pars. 61 (1985), was enacted "to protect the construction worker and the general public from suffering construction-related injuries." *Bosio*, 506 N.E.2d at 998. This policy goal clearly differs from the goal of the Texas oilfield act, which was enacted to protect *contractors* from inequitable indemnification provisions. Tex. Rev. Civ. Stat. art. 2212b § 1 (now codified and amended at Tex. Civ. Prac. & Rem. Code § 127.002)).

passage of the Texas statute. *See* HOUSE STUDY COMMITTEE, *supra*, at i. 7.

These cases, however, are not dispositive of the case before us. In *Amoco*, the insurance provision in dispute was directly in support of a prohibited indemnity agreement. 755 P.2d at 53. As discussed, the additional insured provision of HB-5357 is a separate covenant and does not support an indemnity agreement.[17]

The Louisiana cases are distinguishable because that state's Anti-Indemnity statute expressly prohibits additional insured clauses that shift the burden of insurance. LA. REV. STAT. ANN. § 9:2780(G) (West 1986). *See also Babineaux*, 806 F.2d at 1284 n.2; Owen L. Anderson, *The Anatomy of an Oil and Gas Drilling Contract*, 25 Tulsa L.J. 359, 424 (1990). Thus, the Louisiana statute is broader than the Texas statute, which only prohibits certain indemnity agreements. TEX. REV. CIV. STAT. art. 2212b § 2 (now codified and amended at TEX. CIV. PRAC. & REM. CODE § 127.003); *see also* John M. Battiato & Joel W. Gilbertson, *The Changing Insurance Market - Who Will Bear the Risks?*, 32 ROCKY MTN. MIN. L. INST. § 17.04 at 17-18 (1986). If our legislature desired to expand the Texas Anti-Indemnity Act to the breadth of the Louisiana statute, it could have done so. Because it did not, this Court should not interpret the statutory language to include such a restriction.

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[17] The basis for the Wyoming Supreme Court's dicta in *Mountain Fuel* is unclear because the insurance contract was not made part of the record in that case. 578 P.2d at 1354.

Respondents argue that the practical effect of the additional insured provision in HB-5357 is to indemnify Getty by relieving it of responsibility for its sole negligence, and that it thus violates the intentions of the Anti-Indemnity statute. While we do not deny the effect of insurance coverage, we decline to expand the language of our Anti-Indemnity statute to encompass insurance procurement provisions that are not actually indemnity agreements and that do not directly support indemnity agreements. Rather, we construe the language of the statute strictly to permit parties to contract freely with regard to agreements not covered by the statutory language. Thus, the additional insured provision of HB-5357 is not covered by the Anti-Indemnity statute.

V.

EXPRESS NEGLIGENCE DOCTRINE

The trial court rendered summary judgment for respondents on the ground that the express negligence doctrine invalidates the additional insured provision of HB-5357. This common law doctrine, as stated in *Ethyl Corp. v. Daniel Construction Co.*, 725 S.W.2d 705, 708 (1987), provides that:

> [P]arties seeking to indemnify the indemnitee from the consequences of its own negligence must express that intent in specific terms . . . within the four corners of the contract.

Although the court of appeals recognized that the express negligence doctrine has been applied only to "contractual indemnity provisions," it reasoned as follows:

> Texas courts would undoubtedly extend this limitation to insurance provisions covering the indemnity obligation that purport to protect the indemnitee from the results of its sole negligence.

819 S.W.2d at 914. As discussed above, however, the additional insured provision of HB-5357 does not support an indemnity agreement. As amicus curiae Texas Mid-Continent Oil and Gas Association points out, the express negligence doctrine in Texas has been applied only to indemnity provisions, not insurance-shifting provisions. *See Atlantic Richfield Co. v. Petroleum Personnel, Inc.*, 768 S.W.2d 724 (Tex. 1989); *Gulf Coast Masonry, Inc. v. Owens-Illinois, Inc.*, 739 S.W.2d 239 (Tex. 1987) (per curiam); *Singleton v. Crown Central Petroleum Corp.*, 729 S.W.2d 690 (Tex. 1987) (per curiam); *Whitson v. Goodbodys, Inc.*, 773 S.W.2d 381 (Tex. App.—Dallas 1989, writ denied).

We decline to extend the express negligence doctrine to contractual provisions other than indemnity agreements in this case, and we thus hold that this doctrine does not invalidate the additional insured provision of HB-5357.

VI.

CONCLUSION

We affirm the judgment of the court of appeals as to Getty's claims against NL. We reverse the judgment of the court of appeals as to Getty's claims against INA and Youell, and remand those claims to the trial court for further proceedings consistent with this opinion. We express no opinion regarding whether Getty is an additional insured under NL's insurance policies with INA or Youell, or the extent of such coverage, if it exists.

Thomas R. Phillips
Chief Justice

Concurring and Dissenting Opinion by Justice Gonzalez, joined by Justices Mauzy and Doggett.

OPINION DELIVERED: November 11, 1992

IN THE SUPREME COURT OF TEXAS

No. D-1937

GETTY OIL COMPANY AND
TEXACO INC., PETITIONERS

V.

INSURANCE COMPANY OF NORTH AMERICA,
NL INDUSTRIES, INC. AND YOUELL
AND COMPANIES, RESPONDENTS

ON APPLICATION FOR WRIT OF ERROR TO THE
COURT OF APPEALS FOR
THE FOURTEENTH DISTRICT OF TEXAS

CONCURRING AND DISSENTING OPINION

I agree with the Court that res judicata bars any action by Getty against NL. I also agree that the summary judgment for INA and Youell should be reversed and

remanded to the trial court. The Court concludes, however, that paragraph two of the contract is an additional insured provision that does not directly support an indemnity agreement. In so doing, the court takes a contract that is ambiguous and makes a factual determination as to its meaning. For this reason, I cannot join the majority opinion. I would hold that the contract is ambiguous as a matter of law, reverse the judgment of the court of appeals, and remand the cause to the trial court for a trier of fact to determine whether the parties intended paragraph two of HB-5357 to be an additional insured provision or an insurance provision in support of the indemnity agreement.

The pertinent rules of contract construction are set out in *Coker v. Coker*, 650 S.W.2d 391, 393-94 (Tex. 1983):

> If the written instrument is so worded that it can be given a certain or definite legal meaning or interpretation, then it is not ambiguous and the court will construe the contract as a matter of law. A contract, however, is ambiguous when its meaning is uncertain and doubtful or it is reasonably susceptible to more than one meaning. Whether a contract is ambiguous is a question of law for the court to decide by looking at the circumstances present when the contract was entered. When a contract contains an ambiguity, the granting of a motion for summary judgment is improper because the interpretation of the instrument becomes a fact issue. (citations omitted).

This contract is reasonably susceptible to more than one interpretation.[1] Getty contends that paragraph two of

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[1] The contract provisions at issue read as follows:

> 4. INSURANCE AND INDEMNITY: Seller agrees to maintain at Seller's sole cost and expense, from the time operations are commenced hereunder until Order is fully performed and discharged, insurance of all types and with minimum limits as follows, and furnish certificates to Purchaser's Purchasing Department evidencing such insurance with insurers acceptable to Purchaser;

[The contract then sets out various required insurance and coverage limits required under the contract]

> All insurance coverages carried by Seller, whether or not required hereby, shall extend to and protect Purchaser, its co-owners and joint venturers (if any), to the full amount of such coverages and shall be sufficiently endorsed to waive any and all claims by the underwriters of insurers against Purchaser, its co-owners, joint venturers, agents, employees and insurance carriers.
>
> Seller shall indemnify, defend and hold harmless Purchaser, its co-owners, joint venturers, agents, employees and insurance carriers from any and all losses, claims, actions, costs, expenses, judgments, subrogations, or other damages relating from injury to any person (including injury resulting in death), or damage (including loss or destruction) to property of whatsoever nature of any person arising out of or incident to the performance of the terms of this Order by Seller (including but not limited to, Seller's employees, agents, subcontractors, and others designated by Seller to perform work or services in, about, or attendant to, the work and services under the terms of this Order). Seller shall not be held responsible for any

HB-5357 is an additional insured provision and does not directly cover the indemnity agreement, and the anti-indemnity statute was never intended to affect this type of insurance agreement or any other insurance arrangement that is not a direct indemnification. This Court agrees with Getty, relying on the fact that the indemnity provision already contains an insurance procurement provision separate and distinct from the "additional insured" provision; therefore, the indemnity provision already contemplates separate insurance coverage and is not dependent upon the coverages contained in the "additional insured" provision. The Court contends that this argument is strengthened by the languages in the "additional insured" provision which states that NL's insurance shall extend to and protect Getty "whether or not required [by the other provisions of the contract]." This is a reasonable interpretation of these provisions. However, it is not the only reasonable interpretation.

INA and Youell argue that this insurance provision contemplates direct indemnification coverage, obligating NL to contractually indemnify Getty, and thus directly supports an indemnity agreement. This interpretation is also reasonable. Nowhere in HB-5357 is the term "additional insured" or any derivative thereof used. Paragraph one of the contract reads "INSURANCE AND INDEMNITY" and sets out the types and limits of insurance coverage NL is required to

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losses, expenses, claims, subrogations, actions, costs, judgments, or other damages, directly, solely, and proximately caused by the negligence of Purchaser. Insurance covering this indemnity agreement shall be provided by Seller.

The liability of Seller, as herein above provided, shall not be limited by the insurance coverage required of Seller.

have under the contract. Both the provision extending NL's insurance over Getty and the indemnity agreement are set out in this section. The last paragraph then states, "[t]he liability of Seller (NL), as herein provided, shall not be limited by the insurance coverage required of Seller."

In construing a contract, courts should look at the contract as a whole in order to give effect to all the provisions. *Coker*, 650 S.W.2d at 393; *Universal C.I.T. Credit Corp. v. Daniel*, 243 S.W.2d 154, 158 (Tex. 1951). No single provision will be given controlling effect; rather, all provisions must be considered with reference to the entire writing. *Daniel*, 243 S.W.2d at 393; *Myers v. Gulf Coast Minerals Mgm't Corp.*, 361 S.W.2d 193, 196 (Tex. 1962). Taken as a whole, this "INSURANCE AND INDEMNITY" section seems to contemplate that the insurance coverages set out in these provisions, including the so called "additional insured" paragraph, directly cover any potential liability of NL under the indemnity provision.

Courts should construe contracts in order to give effect to the intention of the parties. *Harris v. Rowe*, 593 S.W.2d 303, 306 (Tex. 1979). In this case the intention of the parties is not clear. Both parties present reasonable and logical interpretations, thus subjecting the contract to two reasonable and acceptable meanings, the determination of which is a question of fact. Accordingly, I would reverse the judgment of the court of appeals and remand to the trial

court for a trier of fact to determine the true intent of the parties.[2]

Raul A. Gonzalez
Justice

Justices Mauzy and Doggett join this concurring and dissenting opinion.

OPINION DELIVERED: November 11, 1992

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[2] While this Court has determined that an additional insured provision is not covered by the Anti-Indemnity statute, it has left open the question of whether the statute applies to an insurance procurement provision that directly supports an indemnity agreement. Thus, if the trier of fact determines that this provision does support the indemnity agreement, the question of whether it violates the Anti-Indemnity statute would have to be resolved. Because Section 5 of the statute applicable in this case provides that an oilfield indemnity agreement "shall be responsible for the results of his own actions," TEX. REV. CIV. STAT. art. 2212b(5), I would hold that this agreement is void.

APPENDIX B

THE SUPREME COURT OF TEXAS

No. D-1937

GETTY OIL COMPANY AND TEXACO, INC.,

PETITIONERS

v.

INSURANCE COMPANY OF NORTH AMERICA, NL INDUSTRIES, INC. AND YOUELL AND COMPANIES,

RESPONDENTS

ON APPLICATION FOR WRIT OF ERROR TO THE COURT OF APPEALS FOR THE FOURTEENTH DISTRICT OF TEXAS

JUDGMENT

THE SUPREME COURT OF TEXAS, having heard this cause on writ of error to the Court of Appeals for the Fourteenth District, and having considered the appellate record and the argument of counsel, is of the opinion that the judgment of the court of appeals should be affirmed in part and reversed in part.

IT IS THEREFORE ORDERED, in accordance with the Court's opinion, that:

1) That part of the judgment of the court of appeals, as to Getty Oil Company and Texaco, Inc.'s claims against NL Industries, Inc., is affirmed;

2) That part of the judgment of the court of appeals, as to Getty Oil Company and Texaco, Inc.'s claims against Insurance Company of North America and Youell and Companies, is reversed;

3) The cause is remanded to the District Court of Harris County, Texas, for further proceedings in conformity with the opinion of this Court;

4) NL Industries, Inc. shall recover from Getty Oil Company and Texaco, Inc., who shall pay, their costs in this Court and in the court of appeals.

5) Getty Oil Company and Texaco, Inc. shall recover from Insurance Company of North America and Youell and Companies, who shall pay, the costs in this Court and in the court of appeals.

A copy of this judgment and of the Court's opinion is certified to the court of appeals and to the District Court of Harris County, Texas, for observance.

(Opinion of the Court delivered by
Chief Justice Phillips)
(Concurring and Dissenting Opinion by
Justice Gonzalez joined by
Justice Mauzy and Justice Doggett)

November 11, 1992

****

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APPENDIX C

THE SUPREME COURT OF TEXAS
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John T. Adams, Clerk

March 3, 1993

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RE: Case No. D-1937

Style: GETTY OIL COMPANY and TEXACO, INC. v. INSURANCE COMPANY OF NORTH AMERICA, NL INDUSTRIES, INC., and YOUELL AND COMPANIES

Dear Counsel:

Today, the Supreme Court of Texas overruled all the motions for rehearing in the above referenced cause. Motion for rehearing on behalf of Youell & Companies is overruled, as supplemented. Youell & Companies motion to substitute counsel is granted.

Sincerely,

John T. Adams, Clerk

by_____
Blanca Morin, Deputy

y2964\07194\jgcltr.sup

APPENDIX D

Affirmed and Opinion filed November 7, 1991.

In The

FOURTEENTH COURT OF APPEALS

NO. C14-90-00552-CV

GETTY OIL COMPANY AND
TEXACO INC., Appellants

V.

INSURANCE COMPANY OF NORTH AMERICA,
NL INDUSTRIES, INC. AND
YOUELL AND COMPANIES, Appellees

==========

On Appeal from the 280th District Court
Harris County, Texas
Trial Court Cause No. 89-01695

==========

OPINION

Getty Oil Company (Getty) and Texaco Inc. (Texaco) appeal from a summary judgment in their suit against Insurance Company of North America (INA), NL Industries, Inc. (NL), and Youell and Companies (Youell). Appellants raise seven points of error claiming that NL's agreement to extend all insurance coverage to Getty is not a prohibited indemnity agreement. Appellants also contend that res judicata and collateral estoppel do not bar the instant suit. Because we find res judicata applicable, we affirm the trial court's judgment.

Getty and NL contracted for Getty to purchase chemicals and services. Paragraph 4 of the contract is entitled "INSURANCE AND INDEMNITY." This paragraph provides:

> Seller agrees to maintain at Seller's sole cost and expense, from the time operations are commenced hereunder until Order is fully performed and discharged, insurance of all types and with minimum limits as follows, and furnish certificates to Purchaser's Purchasing Department evidencing such insurance with insurers acceptable to Purchaser:
>
> . . .
>
> All insurance coverages carried by Seller, whether or not required hereby, shall extend to and protect Purchaser, its co-owners and joint venturers (if any), to the full amount

> of such coverages and shall be sufficiently endorsed to waive any and all claims by the underwriters or insurers against Purchaser, its co-owners, joint venturers, agents, employees and insurance carriers.
>
> Seller shall indemnify, defend and hold harmless Purchaser, its co-owners, joint venturers, agents, employees and insurance carriers from any and all losses, claims, actions, costs, expenses, judgments, subrogations, or other damages . . . . Seller shall not be held responsible for any losses, expenses, claims, subrogations, actions, costs, judgments, or other damages, directly, solely, and proximately caused by the negligence of Purchaser. Insurance covering this indemnity agreement shall be provided by Seller.

Carl Duncan, a Getty employee, was injured when a barrel of NL chemicals exploded. Duncan died from his injuries and his estate brought a wrongful death suit against Getty, NL, and others. Getty filed a cross claim against NL for indemnity and contribution. The jury found Getty 100% negligent and the trial court denied Getty's cross-action for contribution and indemnity. Getty settled with the plaintiff but appealed the adverse ruling on its cross action. The trial court's ruling was affirmed on appeal. *See Duncan v. Getty Oil Corp.*, 721 S.W.2d 475 (Tex. App.—Corpus Christi 1986, writ ref'd n.r.e.).

Getty then filed the instant suit against NL for breach of contract in failing to name Getty as an additional insured and against the primary and excess carriers, INA and Youell respectively, for not paying on the policies. Appellees filed

motions for summary judgment on the grounds that Getty's claims were barred by the express negligence doctrine, by the Texas Oilfield Anti-Indemnity Statute, and by res judicata. The trial court granted these motions.

A trial court properly grants summary judgment only when the movant establishes that there are no genuine issues of material fact and that the movant is entitled to judgment as a matter of law. *See* TEX. R. CIV. P. 166a(c). In reviewing a summary judgment, an appellate court must accept as true all evidence favorable to the nonmovant, indulging all reasonable inferences and resolving all doubts in the non-movant's favor. *See Nixon v. Mr. Property Management Co.*, 690 S.W.2d 546, 548-49 (Tex. 1985).

In point of error six, appellants claim the trial court erred as a matter of law in granting summary judgment based on res judicata. Res judicata involves the principles of merger and bar. If a plaintiff prevails, his cause of action merges into the judgment, dissolving the cause of action. *Jeanes v. Henderson*, 688 S.W.2d 100, 103 (Tex. 1985). If, on the other hand, the plaintiff loses the original suit, the plaintiff is barred from bringing another action upon the claims actually litigated *and those that could have been litigated in the original action. Id.*; *Texas Water Rights Comm'n v. Crow Iron Works*, 582 S.W.2d 768, 771-72 (Tex. 1979). Thus, res judicata prevents a plaintiff from bringing a second suit against the same parties or their privies asserting causes of action arising out of the same subject matter and that might have been asserted in the first suit. *Texas Water Rights Comm'n*, 582 S.W.2d at 772; *Abbott Laboratories v. Gravis*, 470 S.W.2d 639, 642 (Tex. 1971). Generally, "a judgment on the merits in a suit on one cause of action is not conclusive of a subsequent suit on a different cause of action except as to issues of fact actually liti-

gated and determined in the first suit." *Griffin v. Holiday Inns of America*, 496 S.W.2d 535, 538 (Tex. 1973). A party may not, however, relitigate the same claim under a different theory. *see id.* at 537 (citing *Abbott*, 470 S.W.2d at 642).

Appellees argue that appellants' suit is a disguised attempt to relitigate the original claim for indemnity. In support of this argument, appellees cite *Ocean Drilling & Exploration Co., Inc. v. Mont Boat Rental Services, Inc.*, 799 F.2d 213 (5th Cir. 1986). In that case, an Ocean Drilling employee was injured while unloading equipment from a boat owned by Mont. *Id.* at 215. The employee sued Ocean Drilling who in turn filed third-party claims of contribution and indemnity against Mont. *Id.* The jury absolved Mont of any wrongdoing and found Ocean Drilling at fault, assessing damages of $340,000.00. *Id.* The trial court rendered judgment against Ocean Drilling on its third-party claims. *Id.* Ocean Drilling then brought suit against Mont and its insurers and broker for reimbursement of the amount paid to the injured employee. *Id.* The trial court dismissed Ocean Drilling's suit on the ground of res judicata. *Id.*

The Fifth Circuit applied the transactional test of the RESTATEMENT (SECOND) OF JUDGMENTS to determine whether the causes of action in the two suits were the same.[1] *Id.* at 217 (citing RESTATEMENT (SECOND) OF

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[1] The RESTATEMENT transactional test provides:

> When a valid and final judgment rendered in an action extinguishes the plaintiff's claim pursuant to the rules of merger or bar . . ., the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or

JUDGMENTS § 24(1) (1982)). Although the court acknowledged that the theories asserted in the two suits were different, the court found that the right Ocean Drilling sought to redress, reimbursement for the obligation incurred as a result of the judgment in the first suit, was the same in both suits. *Id.* Because the two causes of action were based on substantially the same facts, the court held that res judicata barred the second suit. *Id.*

Citing *Griffin v. Holiday Inns of America*, 496 S.W.2d 535, 538 (Tex. 1973), appellants claim that *Ocean Drilling* is inapplicable because Texas courts expressly refuse to follow the RESTATEMENT transactional test. In *Griffin*, the court clarified a prior holding that a party cannot relitigate matters that could have been raised in a prior action between the same parties or their privies relating to the same subject matter. *Id.* at 537 (citing *Abbott*, 470 S.W.2d at 642). The *Griffin* court held that the term "subject matter" refers to "the claim or controversy at issue in the earlier suit and not to the transaction out of which the suit arose." *Id.* The court further stated:

> We have not said or held that a judgment in a suit on one claim or cause of action is necessarily conclusive of all claims and causes of action against the same party, or relating to the same property, or arising out of the same

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> series of connected transactions, out of which the action arose.

RESTATEMENT (SECOND) OF JUDGMENTS § 24(1) (1982). Comment (c) to § 24 adds that multiple transactions are not created simply because a number of legal theories of liability are applicable. RESTATEMENT (SECOND) OF JUDGMENTS § 24, comment (c) (1982).

> transaction. Apparently some courts have gone that far, but we are unwilling to do so.

Id. at 538.

We disagree with appellants' reliance on this statement in *Griffin*. Even if Texas courts do not apply res judicata to all claims arising from the same transaction, they do apply res judicata where a party reasserts the same claim under a different theory. *See id.* at 537 (citing *Abbott*, 470 S.W.2d at 637 (plaintiff lost original suit alleging negligence and attempted to bring second suit alleging products liability)). Thus, we must determine whether appellants' claim in this case is essentially the same claim raised in the prior suit.

In the first suit, appellants sought indemnity from NL under the indemnity provision of the contract. In the instant suit, appellants seek reimbursement of the amount paid to the plaintiff in the first suit from NL and its insurers based on the provision that NL would extend all insurance coverage to Getty. Appellants allege that NL breached its contract by failing to make Getty an additional insured on the policies and that NL's insurers wrongfully denied payment to Getty as an additional insured.

Paragraph 2 of the "INSURANCE AND INDEMNITY" provision of the contract states that "[a]ll insurance coverages carried by [NL], whether or not required hereby, shall extend to and protect [Getty] . . . ." Because appellants seek reimbursement for the amount paid to the plaintiff in the prior suit under this provision, appellees argue that appellants' construction of this provision would transform the provision into a prohibited agreement to indemnify Getty for its sole negligence. Appellees

contend that *Fireman's Fund Ins. Co. v. Commercial Standard Ins. Co.*, 490 S.W.2d 818 (Tex. 1972), *overruled*, *Ethyl Corp. v. Daniel Constr. Co.*, 725 S.W.2d 705 (Tex. 1987), remains viable to the extent it addresses provisions for insurance and that it is controlling in this regard. In *Fireman's Fund*, the contract provided:

> The Contractor shall protect the Owner and Architect-Engineer against all liabilities, claims or demands for injuries or damages to any person or property growing out of the performance of work under this specification.
>
> . . . .
>
> In addition to the Liability Insurance for the protection of the Owner and Architect-Engineer, the Contractor shall, during the continuance of the work under this contract and also extra work in connection therewith, maintain Liability Insurance for injury and/or death to any of his employes [sic] and/or to other persons, including any liability which may arise by virtue of the statute or law now in force or which may hereafter be enacted.
>
> . . . [Contractors] shall specifically and distinctly assume and do so assume all risks of damage or injury from any cause except negligence of Owner . . . .

Id. at 821 (emphasis omitted). Because the *Fireman's Fund* contract required the contractor to carry liability insurance to protect the owner against all claims and demands growing out of performance of the contract, the owner argued that

the contractor agreed to cover the owner's negligent acts. *See id.* at 823. The court disagreed and interpreted the requirement to carry liability insurance as a provision to assure performance of the subsequent indemnity provision and not as evidence of an intent to broaden the contractual indemnity obligation. *Id.*

Although the holding in *Fireman's Fund* indicates that Texas courts will avoid construing an insurance provision to extend an indemnity obligation to cover an indemnitee's sole negligence, factual differences prevent us from holding *Fireman's Fund* controlling. The extension of coverage provision in the NL-Getty contract provides that NL shall extend all of its insurance coverages, *whether or not required by the other provisions of the contract*, to cover Getty. Thus, the express language of the contract precludes a finding, as in *Fireman's Fund*, that the extension of coverage provision was intended only to assure performance of the indemnity agreement.

Appellees argued in the trial court that the extension of insurance provision was unenforceable because it violated a Texas statute and the express negligence test. Article 2212b declares void the indemnity provisions in certain agreements purporting to indemnify the indemnitee against liability for damages caused by its sole or concurrent negligence. *See* Act of June 16, 1973, 63rd Leg. R.S., ch. 646, 1973 Tex. Gen. Laws 1767 (formerly TEX. REV. CIV. STAT. ANN. art. 2212b, §§ 1-2 (Vernon 1979); repealed 1985 and now codified at TEX. CIV. PRAC. & REM. CODE ANN. §§ 127.001-127.008 (Vernon 1986 & Vernon Supp. 1991)) (hereinafter referred to as art. 2212b). This statute applies to "agreements pertaining to wells for oil, gas, or water, or mines for other minerals." *Id.* at § 1. Appellants maintain that art. 2212b is inapplicable because: (1) the

instant contract does not contain an indemnity provision prohibited by art. 2212b; (2) the extension of insurance coverage provision does not constitute an indirect indemnity such that art. 2212b applies; and (3) the instant contract is not an agreement pertaining to wells.

We turn first to appellants' claim that art. 2212b is inapplicable because the extension of coverage provision of the contract does not constitute an indemnity obligation. Appellants ask this court to follow case law from federal and other state courts, faced with similar contractual provisions, that held that such provisions are not indemnities rendered void by anti-indemnity statutes or by common law prohibitions. *See Voisin v. O.D.E.C.O. Drilling Co.*, 744 F.2d 1174, 1177 (5th Cir. 1984), *cert. denied*, 470 U.S. 1053 (1985) (where contract required promisor to name promisee as additional insured on promisor's insurance policies, court held that provision was not void under a federal anti-indemnity statute); *Price v. Zim Israel Navigation Co.*, 616 F.2d 422, 428-29 (9th Cir. 1980) (found no violation of federal anti-indemnity statute where contract required promisor to name promisee as co-insured on comprehensive liability policy); *Cone Bros. Contracting Co. v. Ashland-Warren, Inc.*, 458 So.2d 851, 856 (Fla. Dist. Ct. App. 1984), *pet. denied*, 464 So.2d 554 (Fla. 1985) (found Florida anti-indemnity statute inapplicable to contract provision obligating promisor to provide insurance and to name promisee as additional insured); *Terrace Shopping Center Joint Venture v. Oxford Group, Inc.*, 192 Ga. App. 346, 384 S.E.2d 679, 680 (Ga. Ct. App. 1989) (held Georgia anti-indemnity statute did not render void a contractual provision requiring promisor to maintain insurance and to name promisee as additional insured on all liability policies); *Bosio v. Branigar Org., Inc.*, 154 Ill. App. 611, 506 N.E.2d 996, 998-99 (Ill. App. Ct. 1987) (where contract required

promisor to furnish insurance indemnifying promisee from all personal injury claims, court found anti-indemnity statute inapplicable because it found the provision to be an agreement to obtain insurance and not an agreement to indemnify); *Zettel v. Paschen Contractors, Inc.*, 100 Ill. App. 3d 614, 427 N.E.2d 189, 191 (Ill. App. Ct. 1981) (where contract required promisor to add endorsement to insurance policies covering promisee's liability, court found Illinois anti-indemnity statute inapplicable); *Heat & Power Corp. v. Air Prod. & Chem., Inc.*, 578 A.2d 1202, 1206 (Md. Ct. App. 1990) (held that contract requiring promisor to name promisee as additional insured did not require promisor to insure promisee against its own negligence); *Kinney v. Lisk Co., Inc.*, 557 N.Y.S.2d 283, 76 N.Y.2d 215, 556 N.E.2d 1091-92 (N.Y. 1990) (found no violation of New York anti-indemnity statute where contract required promisor to maintain such insurance policies as would protect both promisor and promisee); *Pickhover v. Smith's Mgmt. Corp.*, 771 P.2d 664, 668 (Utah App. 1989), *cert. denied*, 795 P.2d 1138 (Utah 1990) (where promisor agreed to provide insurance coverage to protect promisee against personal injury, death, or property damage claims, court found provision not subject to Utah rule of strict construction of indemnity agreements).

Appellees, on the other hand, cite a number of cases from other jurisdictions invalidating provisions similar to the one at issue here. *See Singh v. John Gargas Landslide Repairs*, 588 F. Supp. 1359, 1362 (C.D. Cal. 1984) (where contract required promisor to carry insurance, court denied promisee's claim that provision was implied contractual indemnity agreement); *Nesom v. Chevron U.S.A., Inc.*, 633 F. Supp. 55, 59 (E.D. La. 1984) (where contract required promisor to carry insurance protecting both parties, court refused to interpret this to require promisor to insure promisee's negligence because this would violate the

promisee's negligence because this would violate the Louisiana anti-indemnity statute); *University Plaza Shopping Center v. Stewart*, 272 So.2d 507, 512 (Fla. 1973) (where contract required promisor to indemnify promisee and to maintain liability insurance covering both parties, court found that provision did not authorize indemnification for promisee's sole negligence and that insurance coverage did not extend beyond promisor's liability); *Westinghouse Elec. Elevator Co. v. La Salle Monroe Bldg. Corp.*, 395 Ill. 429, 70 N.E.2d 604, 607 (1946) (Although promisor agreed to provide insurance covering both parties, court refused to construe provision to require promisor to indemnify promisee against its own negligence in absence of clear language in contract to that effect); *Fourfouris v. Standard Oil Realty Corp.*, 100 Ill. App. 3d 162, 426 N.E.2d 915, 916-17 (1981) (followed *Westinghouse* and refused to construe provision to provide insurance as agreement to protect other party against its own negligence in the absence of clear language in contract); *Amoco Prod. Co. v. Action Well Serv., Inc.*, 107 N.M. 208, 755 P.2d 52, 55 (1988) (where contract required promisor to obtain insurance covering indemnity agreement, court held that provision related to insurance purchased by indemnitor to protect its own interest and not to the interest of the indemnitee); *Mountain Fuel Supply Co. v. Emerson*, 578 P.2d 1351, 1354 (Wyo. 1978) (although contract required contractor to maintain insurance, court expressed doubt that insurance could save a prohibited indemnity agreement, but the court did not need to decide the issue since the insurance policy was not in the record).

Although appellees attempt to attribute the split in authority to differences in the individual contractual provisions and statutes involved, we do not find these distinctions significant. All of the statutes invalidate

indemnity agreements that purport to protect the indemnitee from the results of its own negligence. Appellees argue that, if we look to other jurisdictions for guidance, we should follow the case law in Louisiana, New Mexico, and Wyoming because these states have oilfield anti-indemnity statutes similar to the Texas statute. That the Louisiana, New Mexico, and Wyoming statutes relate to agreements between parties in the oil, gas, or mining industries is, in our opinion, not a persuasive reason to follow the holdings in those states. These statutes, like the non-oilfield anti-indemnity statutes cited in other cases, all prohibit agreements that purport to indemnify the promisee against the results of its sole negligence. Furthermore, the Louisiana statute differs from all other statutes in that it expressly prohibits "waivers of subrogation, additional named insured endorsements, or any other form of insurance protection which would frustrate or circumvent the prohibitions of [the statute] . . . ." LA. REV. STAT. ANN. § 9:2780(G) (West 1991). The Texas statute includes no such prohibition.

Although some of the cases are distinguishable in that the insurance provisions are expressly tied to the indemnity obligation, *see Fourfouris*, 462 N.E.2d at 917; *Amoco*, 755 P 2d at 53; *Bosio*, 506 N.E.2d at 997; we cannot justify the split in the jurisdictions solely on the basis of differences among the contractual provisions. We find no significant difference between a provision requiring a promisor to obtain and maintain insurance covering the promisee and a provision requiring the promisor to name the promisee as an additional named insured on the promisor's policy.

The cases cited by appellant reason that an insurance provision is distinct from an indemnity agreement because an insurance procurement provision does not make the

Terrace, 384 S.E.2d at 680. Rather, those courts find that such a provision merely shifts the risk of loss to an insurance company and only renders the promisor liable for paying the insurance premiums. *See, e.g., Price*, 616 F.2d at 429. While this may be true, the promisor may be liable for a judgment against the promisee where the promisor breaches the agreement to procure insurance. *See Zettel*, 427 N.E.2d at 193. In making the distinction between insurance and indemnity, those courts fail to mention that, by upholding the insurance provision, the promisee is permitted to do indirectly what it cannot do directly under the anti-indemnity statute -- avoid liability for its sole negligence. *See Nesom*, 633 F. Supp. at 59. Although the provision here is, by its express terms, not intended to support only the indemnity obligation, the effect of upholding it would be to allow Getty to avoid liability for its sole negligence. This result does, as appellees argue, contravene the statutory goal of prohibiting agreements allowing a party to avoid responsibility for the results of its own negligence.

Even if art. 2212b were inapplicable on the ground that the contract does not pertain to oil or gas wells, upholding the instant provision would contravene public policy expressed in Texas common law limiting the right of parties to contract for indemnity. Under the express negligence doctrine, an obligation to indemnify a promisee from the consequences of its own negligence must be specifically expressed in the contract. *See Ethyl Corp. v. Daniel Constr. Co.*, 725 S.W.2d 705, 708 (Tex. 1987). Although case law applies the express negligence doctrine to contractual indemnity provisions, *see Continental Steel Co. v. H.A. Lott, Inc.*, 772 S.W.2d 513, 515 (Tex. App.—Dallas 1989, writ denied), Texas courts would undoubtedly extend this limitation to insurance provisions covering the indemnity obligation that purport to protect the indemnitee from the

results of its sole negligence. *See Fireman's Fund*, 490 S.W.2d at 823. Despite appellants' arguments to the contrary, we find that upholding the extension of coverage provision would allow appellants to avoid the consequences of their own negligence. This relief is identical to that sought in the first suit in its claim for indemnity.

Because appellant seeks reimbursement of the amount paid to the plaintiff in the original lawsuit based on the finding that appellant was solely negligent, appellant seeks the same relief sought in the original suit. Faced with precisely the same circumstances, the Fifth Circuit held that res judicata barred the second sui. *See Ocean Drilling*, 799 F.2d at 215. Similarly, Texas law bars a party from attempting to relitigate a claim for damages under a different theory of liability. *Griffin*, 496 S.W.2d at 537. Because we find that appellant seeks the same relief in this suit as it unsuccessfully sought in the first suit, res judicata bars appellant from reasserting this claim under a different theory. Thus, the trial court properly rendered summary judgment in favor of appellees. We overrule point of error six.

Having held that the trial court properly granted summary judgment based on res judicata, we need not address appellants' other points of error.

We affirm the trial court's judgment.

/s/ Ross A. Sears
Justice

Judgment rendered and Opinion filed November 7, 1991.

Panel consists of Justices Robertson, Sears, and Draughn.

Publish - TEX. R. APP. P. 90.

Y2964\07194\JGC93139.503

NOVEMBER 7, 1991.

JUDGMENT

THE FOURTEENTH COURT OF APPEALS

GETTY OIL COMPANY AND
TEXACO INC., APPELLANTS

NO. C14-90-00552-CV

V.

INSURANCE COMPANY OF NORTH AMERICA,
NL INDUSTRIES, INC. AND
YOUELL AND COMPANIES, APPELLEES

This cause, an appeal from an order granting summary judgment in favor of GETTY OIL COMPANY AND TEXACO INC. signed May 3, 1990, came on to be heard on the transcript of the record. We have inspected the record and find no error in the judgment. We order the judgment of the court below AFFIRMED.

We order GETTY OIL COMPANY AND TEXACO INC. jointly and severally to pay all costs incurred by reason

of this appeal. This decision is ordered certified below for observance.

Y2964\07194\JGC93139.503

APPENDIX E

NO. 89-1695-A

GETTY OIL CORPORATION, Succeeded by and a Division of TEXACO, INC., Plaintiff,	§	IN THE DISTRICT COURT
VS.	§	OF HARRIS COUNTY, TX
INSURANCE COMPANY OF NORTH AMERICA; NL INDUSTRIES, INC., D/B/A NL TREATING CHEMICALS, INC.; and YOUELL & COMPANIES	§	280TH JUDICIAL DISTRICT

ORDER GRANTING SUMMARY JUDGMENT

This matter having come before the Court on the motions for summary judgment and amended motions for summary judgment of NL Industries, Inc.; Insurance Company of North America; and Youell & Companies (herein "defendants"); the Court having considered the motions and amended motions and all responses thereto, as well as the arguments of counsel, is of the opinion that defendants' motions and amended motions are well founded and should be granted.

IT IS THEREFORE ORDERED that defendants' motions and amended motions for summary judgment should be and are hereby granted as to all claims asserted against defendants in the pleadings by Getty Oil Company and Texaco, Inc. previously referred to as Getty Oil Corporation, succeeded by and a Division of Texaco, Inc.

IT IS THEREFORE FURTHER ORDERED that defendants have final judgment that plaintiffs take nothing as to

all of plaintiffs' claims and causes of action. Costs are assessed against plaintiffs and in favor of defendants, for which let execution issue if not timely paid.

All relief not expressly granted herein is hereby denied.

Signed this 3rd day of May, 1990.

_____

DISTRICT JUDGE
280TH JUDICIAL DISTRICT COURT

APPROVED AS TO FORM:

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RYMAN & LEE, P.C.

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APPENDIX F

NO. D-1937

IN THE TEXAS SUPREME COURT

GETTY OIL CORPORATION,
SUCCEEDED BY AND A
DIVISION OF TEXACO, INC.,

PETITIONER,

V.

INSURANCE COMPANY OF NORTH AMERICA;
NL INDUSTRIES, INC., D/B/A NL TREATING
CHEMICALS INC.; AND YOUELL & COMPANIES,

RESPONDENTS

FURTHER SUPPLEMENT TO YOUELL & COMPANIES' MOTION FOR REHEARING

TO THE HONORABLE JUSTICES OF THE TEXAS SUPREME COURT:

Respondent Youell & Companies wishes to bring to this Court's attention additional authority in support of its Point of Error IV on rehearing, which argues that this Court erred in rendering a *sua sponte* partial summary judgment in favor of Getty. *See* Youell's Motion for Rehearing at 10-14; Youell's Supplemental Brief on Rehearing (Dated February 1, 1993), at 2-3; Youell's letter brief (dated December 7,

1992), at 1-2. This Court should recognize the constitutional due process implications of its decision.

In *Fountain v. Filson*, 336 U.S. 681, 682-83 (1949), the United States Supreme Court held that, just as a trial court cannot grant a *sua sponte* summary judgment without notice and an opportunity for the parties to present all of their defenses, neither may an appellate court, in reviewing grant of summary judgment for one party, grant summary judgment for the other party.

The rule in *Filson* is firmly grounded in principles of due process. The 14th Amendment to the United States Constitution forbids the exercise of judicial power without notice to the defendant and an opportunity to be heard. *Pennoyer v. Neff*, 95 U.S. 714, 732-33 (1878). Notice and an opportunity to be heard are required "even if the facts are clear." *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 543 (1985). And, of course, "the fundamental requirement of due process is to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge*, 424 U.S. 319, 333 (1965). This is the reason the summary judgment rule requires "adequate procedural opportunity to oppose the motion." *White v. Texas American Bank/Galleria, N.A.*, 958 F.2d 80, 82-85 (5th Cir. 1992). *See Powell v. U.S.*, 849 F.2d 1576, 1579-82 (5th Cir. 1988) ("[T]he . . . court must give proper notice to insure that the nonmoving party had the opportunity to make every possible factual and legal argument," *id.* at 1579); *Western Fire Ins. Co. v. Copeland*, 786 F.2d 649, 652 (5th Cir. 1986) (purpose of summary judgment notice requirement is to afford a "reasonable and meaningful opportunity" to be heard); *Winbourne v. Eastern Air Lines Inc.*, 632 F.2d 219, 223 (2d Cir. 1980) (party must be afforded the "due process protections specified in" the summary judgment rule).

The Fifth Circuit has recognized that appellate courts sometimes err by going "too fast in making findings against" movants, thereby depriving movants of the necessary notice of possible findings against them. *Landry v. Air Line Pilots Association International AFL-CIO*, 901 F.2d 404, 437-38 (5th Cir. 1990), *cert. denied* 111 S.Ct. 244 (1990) (modification of opinion on motion for rehearing). In such a circumstance, the overreaching opinion should be limited by modification upon motion for rehearing. *Id.*

On appeal, it is especially important to heed these due process requirements. Unlike a proceeding in a trial court, where a party deprived of notice may at least present his case via a motion for new trial, in an appellate court a party has absolutely no opportunity to present the Court with additional material supporting its case. In ruling that Getty's construction of HB-5357 was correct as a matter of law, this Court violated mandatory procedural safeguards, which resulted in Youell being unable to present *all* of its defenses to Getty's construction of the contract. By so depriving Youell, this Court has violated its right to due process under the 5th and 14th Amendments of the United States Constitution.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been served by certified mail, return receipt requested, to all counsel in the following list, on this the 22nd day of February, 1993.

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_____
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